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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-1291

ROBERT B. BRUCE,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit

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INDEX

	Page
Prayer	1
Opinion below	1
Jurisdiction	2
Questions presented	2
Constitutional provisions and statutes involved	3
Statement of the case	5
Reasons for granting the writ	8
Appendix I—Opinion and judgment of the U. S. Court of Appeals for the Fifth Circuit	A-1
Order denying petition for rehearing	A-18
Appendix II—Amended verdict	A-19

Cases Cited

Adcock, Administratrix v. Mandeville Mills, 182 Ga. 244, 185 S.E. 288	11
Beardsley v. Ernst, 47 Ohio App. 241, 16 Ohio L. Abs. 719, 191 N.E. 808	12
Citizens and Southern National Bank v. Johnson, 214 Ga. 229, 104 S.E.2d 123	12
Colorificia Italiano Max Mayer, etc. v. S/S Hellenic Wave, etc., 5 Cir., 419 F2d 223	11
Farkas v. Farkas, Trustee, 200 Ga. 886, 38 S.E. 2d 924	11

Fineberg v. United States, 9 Cir., 393 F2d 417 11
Fouche v. Merchants National Bank of Rome, 110 Ga. 827, 36 S.E. 256 11
Gregory v. United States, 5 Cir., 253 F2d 104 ..... 2, 8
O'Conner v. Ludlam, 2 Cir., 92 F.2d 50, cer den 302 U.S. 758, 82 L.Ed. 586, 58 S. Ct. 364 12
Piassick v. United States, 5 Cir., 253 F2d 658 11
Shreve v. United States, 9 Cir., 103 F2d 796 11
Spratling v. Westbrook, 140 Ga. 625, 79 S.E. 536 11
Stephens Industries, Inc. v. Haskins and Sells, 10 Cir., 438 F.2d 357 12

Statutes Cited

Constitution of the United States:
Fifth Amendment 3
15 U.S.C. § 77q(a) et seq. 2, 3, 5, 9
18 U.S.C. § 371 .....2, 4, 5
18 U.S.C. § 1341 .....2, 3, 5, 9
28 U.S.C. § 1254(1) 2

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ROBERT B. BRUCE,
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UNITED STATES OF AMERICA,
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PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit

Robert B. Bruce, your petitioner, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case December 18, 1973. A petition for rehearing was denied January 25, 1974.

OPINION BELOW

The opinion of the Court of Appeals has not been reported. A copy is appended as Appendix I.

JURISDICTION

The judgment of the Court of Appeals was entered December 18, 1973. Petition for rehearing was denied January 25, 1974.

Jurisdiction to issue the writ is invoked, pursuant to the provisions of Title 28, Section 1254 (1), United States Code.

Petitioner was convicted in the United States District Court for the Northern District of Georgia on two counts of a multi-count indictment charging him with violations of the provisions of **Title 18, Section 1341, United States Code,** and **Title 18, Section 371, United States Code.**

QUESTIONS PRESENTED

1. Whether the definition of fraud announced by the Fifth Circuit Court of Appeals in its decision in **Gregory v. United States,** 5 Cir., 253 F2d 104, 109, viz:

> "Essentially, a scheme to defraud is measured by a non-technical standard. 'It is a reflection of moral uprightness, of fundamental honesty, fair play and right dealing in the general and business life of members of society.' "

was properly applied to a criminal prosecution involving violations of the Federal Securities Act (**Title 15, Section 77q** (a), et seq., United States Code)?

2. Whether the offer and sale of securities issued by an insolvent corporation, utilizing prospectuses which show the corporation to be insolvent, constitute offenses punishable under the Federal Securities Act (**Title 15, Section 77q (a),** et seq., United States Code)?

3. Whether Petitioner, by reason of the failure of the Fifth Circuit Court of Appeals to consider and rule on the errors assigned by him in his Appeal, has been denied procedural safeguards established for the protection of person charged with criminal offenses and thereby denied due process of law?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the Constitution of the United States Provides:

> "No person shall . . . be deprived of life, liberty or property, without due process of law; . . ."

Title 15, Section 77q (a), United States Code provides:

> "It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—
>
> (1) To employ any device, scheme, or artifice to defraud, or
>
> (2) To obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser."

Title 18, Section 1341, United States Code, provides:

> "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or

property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at a place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000, or imprisoned not more than five years, or both."

Title 18, Section 371, United States Code Provides:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

STATEMENT OF THE CASE

Petitioner, along with Robert S. Walker and Robert A. Blackwood, was charged in a multi-count indictment in the Atlanta Division of the Northern District of Georgia with violations of the Securities Act (Title 15, Section 77q (a) USC), Mail Fraud (Title 18, Section 1341, USC), and Conspiracy (Title 18, Section 371, USC).

A jury trial was waived and, following a lengthy trial to the Court, a verdict was entered finding him guilty on two counts (mail fraud and conspiracy). Thereafter, concurrent sentences of two years on each count, to serve six (6) months in a jail type institution, the remainder to be suspended, were imposed. Copy of the amended verdict is appended as Appendix II.

The violations are charged to have occurred with respect to American Capital Corporation, a Georgia Corporation, of which defendant Robert S. Walker was President, defendant Robert A. Blackwood was Secretary from its inception until about November, 1967, and John R. Creighton Secretary thereafter.

American Capital began operations about December 13, 1966, and ceased approximately April 30, 1969. A total of $61,055 is alleged by the Government to have been received from sales of stock, which included $25,000 from initial stockholders and $154,367 from issuance of investment certificates. The first investment certificate was sold May, 1967, and the last in March, 1969. Total cash received was $215,960.84.

Appellant Bruce is from Miami, Florida, and is an accountant and management consultant. He was contacted by Appellant Walker in December, 1966, to perform an audit for use in filing an intrastate registration in Georgia. Thereafter, Bruce prepared the financial statements incorporated in the American

Capital prospectus dated January 31, 1967, and a second prospectus dated April 5, 1968.

The prospectuses carried boldly announced investment admonitions, viz:

> "THESE ARE SPECULATIVE SECURITIES
>
> 'This is not to be construed as a guarantee that there will be profits made by the Company, but is only a guarantee that when and if such profits are made, the stated percentage thereof will be paid to the holders of these Investment Certificates.
>
> Except as otherwise indicated, this Prospectus speaks as of its date of issue.' Neither the delivery hereof, nor any sale made hereunder, shall create an implication that the affairs of the Company have continued without change since said date.' "

Bruce was never an officer or stockholder of American Capital, at any time, solicited no sales, and received only a total of $1800.00, plus some expenses, as remuneration for all accounting services performed.

George M. Callahan, an employee of the Securities and Exchange Commission, was utilized by the Government as an expert. Callahan considered the company insolvent as of May, 1967. Approximately $166,000 was received from the sale of stocks and investment certificates after that time.

Callahan characterized the financial statements prepared by Bruce as not in keeping with sound accounting principles. In the first prospectus his criticisms in the main were levelled, viz:

(a) Inclusion of a note of Robert A. Blackwood for the principal sum of $20,000, secured by 40,000 shares of American Capital Stock (with a legend entered on

the reverse side thereof attempting to limit liability to the stock itself) as a "note receivable"; and

(b) Utilizing an MAI appraisal of Florida real estate at valuation of $1,076,600, rather than $380,387.74, its theoretical cost to the company, in arriving at net worth.

As to the second prospectus, Callahan voiced criticisms, viz:

(a) Cash in bank of $40,000 should not have been included because it represented a savings account being held as collateral for a bank loan in equal amount, the loan being listed as a liability;

(b) The Florida land, although shown as having been foreclosed on, nevertheless was mentioned as a proposed reacquisition, and he considered it improper to state a deficit position and then project hopes, which if fulfilled, would make it solvent again; and

(c) Inclusion of unaudited net worth of Babee-Tenda Products Corporation as of February 16, 1968, of $289,000 since, in his view, mention of unaudited figures with audited figures would thereby give credence to the unaudited.

No witness called by the Government during the lengthy trial testified that either prospectus was relied on in making an investment in American Capital Corporation.

REASONS FOR GRANTING THE WRIT

I. The Fifth Circuit Court of Appeals, by its decision in the instant case, has announced a new and far-reaching test of criminality in Federal fraud prosecutions, viz:

> "Essentially, a scheme to defraud is measured by a non-technical standard. 'It is a reflection of moral uprightness, of fundamental honesty, fair play and right dealing in the general and business life of members of society.'
>
> **Gregory v. United States,** 5 Cir., 1958, 253 F2d 104, 109"

This definition authorizes a finding of guilt upon the fact finder's notions of "moral uprightness", "fundamental honesty", "fair play", and "right dealing."

II. The Fifth Circuit Court of Appeals, by its decision in the instant case, has announced the principle that the offering for sale of securities in an insolvent company violates the Federal Securities Act, even though the prospectus clearly shows the company to be insolvent.

III. The Fifth Circuit Court of Appeals, by its decision herein, ignored and failed to pass upon errors assigned by petitioner in his appeal and thereby denied him the procedural safe-guards guaranteed by the Fifth Amendment.

I

A New Definition of Fraud

The decision of the Fifth Circuit announces a new approach to fraud cases which greatly expands the scope of Federal intervention in everyday business transactions. The test for determining what constitutes a federally proscribed criminal fraud is especially far-reaching: "Essentially, a scheme to defraud is measured by a non-technical standard. 'It is a reflection of

moral uprightness, of fundamental honesty, fair play and right dealing in the general and business life of members of society', Gregory v. United States, 5 Cir., 1958, 253 F2d 104, 109." Slip Op. at p. 12. The Court then continues to state that a scheme to defraud need not even be fraudulent or misrepresent any material fact to be a violation of federal law, if persons of ordinary prudence and comprehension could be misled as to the **possible** future value of an investment in a particular business endeavor.

In the Fifth Judicial Circuit fraud cases will now be equated with obscenity cases. Criminality will be determined not by whether there was an intent to obtain money or property through false pretenses (or failure to disclose material facts), but rather, whether the course of business dealings of the particular defendant comports with the community's ideals of "moral uprightness, of fundamental honesty, fair play and right dealing."

If the fact finder, jury or as here, District Judge, considers the particular defendant to have violated prevailing community standards of "moral uprightness, of fundamental honesty, fair play and right dealing", i.e., transgressed the morals of the local market place, and made an incidental use of the mails in connection therewith, a Federal crime will be found to have been committed. This could mean one thing in New York, another in Georgia, and something else in California.

The Court did not stop here, however, but continued:

> "The scheme need not be fraudulent upon its face or misrepresent any material fact. All that is necessary is that it be a scheme reasonably calculated to deceive persons of ordinary prudence and comprehension."

The statutes themselves, **Title 15, Section 77q(a),** and **Title 18, Section 1341,** are more narrowly drawn, and should not be thus watered down.

II

Sales of Securities in an Insolvent Corporation

The Fifth Circuit Court of Appeals has announced, and as a holding of first impression, that the offering of securities issued by an insolvent company violates the Federal Securities Acts, even though the prospectus discloses the fact of insolvency clearly.

This case was prosecuted by the Government under the theory that the prospectuses of the company were false and misleading. Yet the District Court found defendants guilty, and the Court of Appeals upheld same for an entirely opposite and novel reason—although both Courts agreed that the prospectus **on its face** clearly showed the company to be financially insolvent, the Defendants were guilty of fraud for continuing to offer such securities for sale, because the prospectus disclosed that the company could not succeed. The Courts reasoned that the Defendants must have known that the company was insolvent because the prospectus clearly demonstrated its dire financial condition. Nevertheless, the Defendants continued to offer these securities to those who desired to risk an investment in an admittedly financially questionable enterprise.

If such activity constitutes a violation of Federal securities laws and the mail fraud statute, then every person offering securities in a financially t[illegible]led business which ultimately fails faces the prospect of federal prosecution. The venture must succeed if the offeror is to escape criminal sanctions.

III

Petitioner Has Been Denied Due Process of Law

In his appeal petitioner assigned procedural errors committed by the District Judge which were substantial in nature and deprived him of a fair trial, viz:

1. The Court erred in permitting G. M. Callahan, an employee of the SEC, to qualify as an expert, and thereafter testify to "generally accepted accounting procedures," and he had not engaged in the practice of public accounting since 1947.

Shreve v. United States, 9 Cir., 103 F2d 796;

Fineberg v. United States, 9 Cir., 393 F2d 417, 421.

2. The Court erred in requiring Appellant Bruce to answer he had been de-certified as a public accountant by the State of Florida, this being irrelevant to the issues of the case and prejudiced him in the eyes of the Court.

Piassick v. United States, 5 Cir., 253 F2d 658;

Colorificia Italiano Max Mayer, etc. v. S/S Hellenic Wave, etc., 5 Cir., 419 F2d 223.

3. The Court erroneously failed to grant Appellant's Motion for Judgment of Acquittal and erred in thereafter adjudging him guilty on Counts Nine and Fifteen. In so doing, Appellant stands convicted on the notions of Government Witness Callahan with respect to "generally accepted accounting procedures" in the preparation of financial statements incorporated in the first and second prospectus issued by American Capital Corporation, which views were as a matter of law inaccurate in that

(a) The Blackwood note was a valid and binding obligation under applicable Georgia Law.

Farkas v. Farkas, Trustee, 200 Ga. 886, 38 S.E. 2d 924;

Fouche v. Merchants National Bank of Rome, 110 Ga. 827, 841, 36 S.E. 256;

Spratling v. Westbrook, 140 Ga. 625, 79 S.E. 536;

Adcock, Administratrix v. Mandeville Mills, 182 Ga. 244, 185 S.E. 288;

Citizens and Southern National Bank v. Johnson, 214 Ga. 229, 104 S.E.2d 123.

(b) The MAI appraisal, stating a value of $1,076,600 for the Florida land, was property utilized under expert testimony offered by Appellant, and the accuracy of this valuation was verified by Henry Blanton, a Florida Realtor familiar with the property, who testified as a witness in the case.

Beardsley v. Ernst, 47 Ohio App. 241, 16 Ohio L. Abs. 719, 191 N.E. 808.

(c) Inclusion of the unaudited net worth of Babee Tenda Products was appropriate since the figure stated was carefully labeled "unaudited".

Stephens Industries, Inc. v. Haskins and Sells, 10 Cir., 438 F.2d 357.

(d) The pledged savings account at First Bank of Palmetto, Georgia, was not inaccurately included in the financial statement but its status as collateral to the company's note, and the fact that it had been used to satisfy the note on March 16, 1968, was clearly stated in the footnote.

O'Conner v. Ludlam, 2 Cir., 92 F.2d 50, cer den 302 U.S. 758, 82 L.Ed. 586, 58 S. Ct. 364.

(e) Reporting the foreclosure proceeds against the Florida land with resultant net loss of $693,196.50 for the period January 1 to February 13, 1968, a deficit net worth of $89,005.33 and a net deficit of $112,452.63, was a correct statement of fact. Noting the existence of an option to redeem by payment of $300,000 could not be fraud on the part of Appellant.

O'Conner v. Ludlam, 2 Cir., 92 F.2d 50, 56, supra.

In its lengthy, and rather generalized opinion, the Fifth Circuit Court of Appeals failed to consider and rule upon the

errors so assigned. Thereby, petitioner has been denied due process of law and deprived of his rights under the Fifth Amendment.

Respectfully submitted

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APPENDIX I

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 73-1398

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

ROBERT B. BRUCE, ROBERT A. BLACKWOOD and ROBERT S. WALKER,
Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Georgia

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(December 18, 1973)

Before BELL, COLEMAN and RONEY, Circuit Judges.

COLEMAN, Circuit Judge: Judge Edenfield, of the United States District Court for the Northern District of Georgia, sitting without a jury, convicted these appellants on various counts of securities fraud, 15 U.S.C., §77q(a), mail fraud, 18 U.S.C., §1341, sale of unregistered securities in interstate commerce, 15

U.S.C., §77e(a), and conspiracy to violate the aforesaid statutes, 18 U.S.C., §371, with individual variations, all counts basically charged the defendants with the unlawful use of the mails in the execution of a fraudulent scheme to sell certain securities.

The appellant, Walker, was convicted on twelve counts and sentenced to serve concurrent terms of three years.

Bruce was convicted on two counts and sentenced to concurrent terms of two years, of which six months must be spent in a penal institution.

Blackwood, an attorney, was convicted on three counts and sentenced to consecutive terms of five years, suspended, with three years probation, as Blackwood was by that time already in prison on other charges.

Except as to Blackwood's conviction on Count 14, which will be reversed, the judgment of the District Court is affirmed.

On appellate review this Court must view the evidence and the reasonable inferences to be drawn therefrom in that light most favorable to the verdict and must determine as a matter of law whether there is substantial evidence, direct or circumstantial, to support the verdict, *Glasser v. United States*, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942); *United States v. Jacobs*, 5 Cir., 1971, 451 F.2d 530. In circumstantial evidence cases, the trier of fact must "reasonably find

that the evidence excludes every reasonable hypothesis, except that of guilt", *United States v. Sidan-Azzam*, 5 Cir., 1972, 457 F.2d 1309. If a conviction is attacked on the ground that the evidence was insufficient to support it there will be an affirmance if it is evident that the findings are not clearly erroneous, *United States v. Davis*, 5 Cir., 1971, 443 F.2d 560, cert. denied 404 U.S. 945 (1971); *United States v. Graves*, 5 Cir., 1970, 428 F.2d 196, cert. denied 400 U.S. 960 (1970).

In one way or another, each appellant challenges the sufficiency of the evidence.

The Fraud

The alleged scheme in this case is predicated upon the incorporation and operation of American Capitol Corporation [hereafter referred to as American or as the Company]. The defendants were either officers of the Company or professionally retained by it. The list included those responsible for the drawing of the two prospectuses which the prosecution contends were false and misleading. Defendant Walker was the primary incorporator and also the President of American.

On December 13, 1966, American was incorporated in Atlanta, Georgia. To avoid coming within the provisions of the Investment Company Act of 1940, 15 U.S.C., §80a(1) et seq., and to aid in the composition of the required prospectus, Walker retained Robert A. Blackwood, an Atlanta attorney. Georgia laws and regula-

tions required the prospectus to contain an elaboration upon the financial condition of the Company by way of certain certified statements. To meet this condition, Walker first approached an accountant with a national accounting firm. After ascertaining what Walker wanted in the financial statement, this accountant turned Walker down because the policy of his firm toward the use of appraisal values in financial statements for newly formed companies would not allow him to do what Walker wanted. [The particular controversy surrounding the use of certain appraisal values will be discussed later.] Walker then contacted Defendant Robert B. Bruce, at the time a C.P.A. in Florida, who agreed to do the necessary accounting work. The first prospectus was offered to the public on January 31, 1967.

As a means of obtaining capital funding, the Company offered two types of securities to the general public: common stock and interest-bearing investment certificates. Initially, the incorporators (and others close to them) received 47% of the stock. On its face, this was not illegal. The problem arises from the fact that while the stock was selling to the general public for $2 a share, the insiders received stock for "incorporation services" amounting to 285,000 shares in return for evaluated consideration of only $20,000.

In the very first year, American went from a surplus to a deficit net worth. In the early part of 1968, the Georgia Securities Commission forbade American to sell any more securities until a new prospectus had been filed. On or about April 5, 1968, a new prospectus,

dated June 1, 1968, was submitted to the Commission and offered to the public. On the face of the financial statements contained in the new prospectus, it was obvious that the Company was insolvent. Finally, in May of 1969, the Company went out of business.

The Government concedes that neither the 1967 nor the 1968 prospectus was false *per se*, but it does contend that they were deliberately and fraudulently misleading.

In the Bench trial below, the hotly contested issues seemed to center around the commissions paid to the securities salesmen, the use of the proceeds received from the sale of the securities, the way the cash assets were presented, certain notes receivable, the value of the land in Florida, listing of unaudited values of a subsidiary alongside audited values, certain footnotes in the prospectuses, and the failure to list certain assets and debts.

The first prospectus represented that the expense of the sale and distribution of the securities would be no higher than 4% for the certificates and 15% for the stock. In actuality, the salesmen received 20% on the certificates and 33 1/3% on the stock.

Next came the use of the proceeds of the securities sales. The prospectus showed that the Company would engage in the investment banking business by purchasing commercial paper, making secured loans, and purchasing securities of other companies. In actuality no funds were ever advanced toward the stated purposes

— although American did assume certain obligations in the acquisition of the assets in Babee-Tenda Products Corporation, a wholly owned subsidiary of American. Instead, many loans were made to insiders, totalling $54,499, of which only $33,415 was ever repaid.

The third alleged misrepresentation concerns the cash assets stated in both prospectuses. In the first, the financial statement was drawn on the 13th day of December, 1966. Two days later, but before the prospectus was completed, a disbursement of $15,000 was made and recorded on the company's books as an exchange item. This item was later removed by an adjusting entry against capital.

In the second prospectus, the cash entry in the financial statement showed $42,809.25. The chief accountant with the Atlanta Regional Office of the Securities and Exchange Commission, the government's expert witness, testified that $40,000 of the sum was borrowed from a bank, placed in a savings account, and then pledged as collateral for the original loan. About a month later, the loan was repaid, and the savings account was closed. A footnote was included explaining this loan but when told such had to be included Walker asked that it not be the first one.

Another irregularity in the case was the failure of Bruce to include an outstanding check for $2,000 which was written prior to the date of the statement. This $2,000 was given as a down payment for an airplane which was not included in the assets of the Company, nor was the debt thus incurred included in the liabili-

ties. Had the prospectus clearly reflected these items, the cash would have actually been $809.35, not $42,809.35.

The next questionable entry concerned a note for $20,000 given to American by Blackwood as payment for 40,000 shares of stock. The government contends that the entry and accompanying footnote were misleading. A footnote stated that Blackwood owed the Company $20,000 on a note receivable bearing 6% interest on or before December 8, 1967. It stated further that the only security for the note was 40,000 shares of American Capital Corporation. In actuality, the note contained a stipulation on the back that it could only be satisfied from the 40,000 shares and did not represent a general indebtedness on the part of Blackwood. The government contended that this was not a valid, enforceable note and should not have been included as such.

The biggest dispute arose over the use of a MAI appraisal for the value of the land American had title to in Florida. This property was purchased from Diversified Enterprises of Florida by incurring obligations amounting to $380,387.74 and issuing 35,000 shares of American stock. The government contended that the true value of the entire parcel did not amount to any more than the debt against it.

The value in the prospectus, based upon a MAI appraisal while the land was still in the hands of Diversified, was listed at $1,076,600. The government produced a witness who aided in the composition of

the report and who stated that the report was an aggregate value based upon total sale of the individual lots, plus certain additions to the land which were to be made. He stated it did not represent the current value of the land as a whole, prior to subdivision and development.

A note in the first prospectus recorded the various debts of the Company but in exact terms it never stated how much the Company owed on the Florida property, nor did the prospectus reveal that the mortgage on the land was overdue when the Company purchased it. The Government contends that the use of the MAI appraisal overstated the stockholders' equity by $716,212.26.

The second prospectus reported that the Florida property had been foreclosed. The Government was particularly affronted by the inclusion of the loss of this property in the comparative statement of income and expenses for the year 1968, contending that it should have been included in 1967's statement as that was the year the foreclosure actually occurred. By placing the loss in 1968, the Government contends that the stockholders' equity was grossly misstated for the year 1967.

Another of the Government's objections related to the inclusion of unaudited figures with audited figures in a footnote explaining the acquisition of Babee-Tenda Products Corporation. This entry, it contends, could be misleading to the buying public, as to the actual value of the property.

The controversial footnote showed, in essence, that the assets of Babee-Tenda Safety Products Corporation were acquired from Babee-Tenda's creditors in bankruptcy by exchanging 26,388 shares of American stock and by the assumption of $75,000 in notes payable. It further stated that the unaudited sales of the newly acquired company was approximately $2,000,000 per year, and the unaudited net worth was reported to be $289,000. Accordingly, this acquisition represented an unrealized, unaudited appreciation in the book value of American in excess of $211,000.

Evidence was also introduced clearly implicating Walker and Blackwood in a scheme whereby they bribed certain Labor Union officials to invest union pension funds in American investment certificates in violation of federal law. The fact that the Union had invested in these certificates was later used as a selling point in some of the Company's promotional material.

In getting down to the nuts and bolts, the Government conceded that the financial statements were not patently false, but asserted that by the addition of footnotes the perpetrators of this alleged fraud intended to mislead and did mislead the buying public into believing that the Company, although inescapably insolvent, had a good chance of becoming a one and a half million dollar company by paying $300,000 on an option to get back the Florida property and by merging with Diversified, which by the time of the second prospectus was in the throes of bankruptcy proceedings.

As a final clincher, the Government introduced evidence of wasteful spending by Walker and Blackwood. For instance, Walker rented a Cadillac, for which the Company paid $1,512. Payments amounting to $2,486.50 were made on Walker's personal automobile loans. The Company also paid $5,822.96 on apartment rent and furniture for Walker, and he received loans totalling $6,315.96 of which only $2,529.35 was ever repaid. In total, Walker received $47,907.14 in benefits from American.

Blackwood also received the use of a rented Cadillac for which the Company paid $1,576. At the time he had the Cadillac Blackwood did not receive any legal fees. Blackwood also received loans of $1,705.60. In total, Blackwood received $10,421.60.

Bruce only received $1,800 in professional fees, plus some expenses.

In the aggregate, the three Defendants received $60,128.74, or 20% of the cash taken in during the life of the Company.

The Government contends that each of the Defendants helped produce the means of inducement — both prospectuses — in the fraudulent scheme. The proof, viewed in the light most favorable to the prosecution, showed that Walker, Blackwood, and Bruce were primarily responsible for the compilation of "facts" which went into each of the prospectuses and that Blackwood actually prepared the footnotes for the second one. As the accountant, Bruce was responsible for

the compilation and formulation of the financial data contained in both. It is argued that since this was purely a professional service, involving matters of judgment, and was not *per se* false, Bruce should have been acquitted. Ordinarily, this should be so, but the record contains evidence clearly indicating that Bruce knew the full implications of what he was doing, yet hesitated not.

The appellate record is composed of twelve typewritten volumes.

In his written verdict, filed February 8, 1973, Judge Edenfield stated that he had "no hesitation in holding the defendant Walker guilty as charged" except for one count on which he found both Walker and Bruce not guilty.

He found Bruce and Blackwood not guilty on ten counts connected with the first prospectus.

As to the second prospectus, Judge Edenfield found that "all of the defendants *knew and could not have failed to know* (emphasis added) that the business they were conducting was a fraud"; that while the Company had collected "over $200,000 from the sale of stock and investment certificates, it had not devoted a single dollar of the Company's assets to the purposes for which the corporation was purportedly created, but instead had squandered and spent vast sums of the Company's assets * * * all without having earned one dime for stockholders or investors".

Essentially, a scheme to defraud is measured by a nontechnical standard. "It is a reflection of moral uprightness, of fundamental honesty, fair play and right dealing in the general and business life of members of society", *Gregory v. United States*, 5 Cir., 1958, 253 F.2d 104, 109.

The scheme need not be fraudulent upon its face or misrepresent any material fact. All that is necessary is that it be a scheme reasonably calculated to *deceive* persons of ordinary prudence and comprehension. The intent of the crime is shown by the scheme itself — here, the active promotion of a company known to be inescapably insolvent by making impossible representations of possible wealth to potential investors, *Silverman v. United States*, 5 Cir., 1954, 213 F.2d 405, cert. denied 348 U.S. 828 (1954).

We must conclude that there was substantial evidence in this case from which the Judge could determine that the defendants were guilty. That being so, his verdict stands impervious to appellate attack.

Former Jeopardy

Defendant Walker, being the only one in a position to do so, objects to his conviction on Counts II and XII of the indictment, arguing that conviction of both violated his privilege against former jeopardy. Basically, Counts II and XII arose from the same set of facts, but the counts alleged violations of different statutes.

Although Walker does not show how he was prejudiced or harassed, such would be irrelevant as each count alleges commission of a separate offense.

Generally speaking, "where the same act or transaction constitutes a violation of two or more distinct statutory provisions, the test to determine whether there are two offenses or only one is whether each provision requires proof of a fact which the others do not", *Gravieres v. United States*, 220 U.S. 338, 342, 31 S.Ct. 421, 55 L.Ed. 489 (1911).

Both statutes involved here have mutual elements of proof in all but one point. 15 U.S.C., §77q(a) requires that the following elements be proved beyond a reasonable doubt:

"1. The offer or sale of a security;

"2. By use of the mails or some means of transportation or communication in interstate commerce; and

"3. That the defendant intentionally did any of the following:

(a) employed a device, scheme, or artifice to defraud;

(b) obtained money or property by means of material misrepresentations or material misleading missions;

(c) engage in a transaction, practice or course of business which would or did operate as a fraud or deceit upon a purchaser of securities."

All that is required to prove a mail fraud charge is (1) the scheme to defraud; representations known by the defendants to be false or misleading; some person or persons must have been defrauded, and (2) causing something to be sent through the mails in execution of the fraudulent scheme, *Bass v. United States*, 5 Cir., 1969, 409 F.2d 179, cert. denied 396 U.S. 863, rehearing denied 396 U.S. 950 (1969); *Silverman v. United States, supra.*

Although, as mentioned before, there are mutual elements of proof, there is one element in 77q(a) which is not present in §1341 — the offer or sale of a security. The result is that Walker's attack must fail for lack of complete mutality. See, also, *United States v. Williams*, 5 Cir., 1970, 424 F.2d 344; 447 F.2d 1285 (En Banc, 1971).

The Sale of Unregistered Securities in Interstate Commerce

The ultimate question to be answered here is whether Blackwood could be considered an "underwriter" at the time of the attempted transfer to Mrs. Ruth Gaygan of stock which he personally owned.

15 U.S.C., §77d(1) exempts the application of §77e(a) to all "*transactions* by any person other than

an issuer, underwriter, or dealer". The Government, in its brief here, strongly contends that Blackwood comes within the definition of an underwriter as found in 15 U.S.C., §77b(11). The pertinent portion of that section is as follows:

> "The term 'underwriter' means any person *who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security,* or participates or has a direct or indirect participation in any such undertaking, or participated or has a participation in the direct or indirect underwriting of any such undertaking . . . ." [Emphasis added.]

The Government has overlooked two essential elements to a valid conviction. First, it argues that Blackwood does not come within the §77d(1) exemption because he is an underwriter; i.e., one who provides an outlet for the stock of an "issuer", *United States v. Re*, 2 Cir., 1964, 336 F.2d 306, cert. denied 379 U.S. 1001 (1965). The fact is apparent that the government is in actuality arguing that Blackwood falls within a class — i.e., "underwriters" — while overlooking the point that §77d(1) exempts transactions, not classes, *Pennaluna & Company v. S.E.C.*, 9 Cir., 1969, 410 F.2d 861, cert. denied 396 U.S. 1007 (1969).

Since it is the transaction which provides the indicia of the crime, the Government must prove that the transaction complained of is, in fact, a violation. As §77d(11) stated, an underwriter is one who takes

from an issuer with a view toward distribution to the general public. The Government has failed to produce any evidence that Blackwood did anything but acquire stock from American for his own personal account. The facts further show that the circumstances under which Blackwood attempted to transfer 2,000 shares of his stock to Mrs. Gaygan was a personal matter, spanning a four to five year period, and in no way involved a solicitation of the type covered by 15 U.S.C. §77e(a).

The result is that we REVERSE Blackwood's conviction on Count 14.

Except as to Blackwood's conviction on Count 14, which is reversed, the judgment of the District Court is, in all other respects, AFFIRMED.

United States Court of Appeals
for the Fifth Circuit

October Term, 1973

No. 73-1398

D. C. Docket No. 26904

United States of America,

Plaintiff-Appellee,

versus

Robert B. Bruce, Robert A. Blackwood and Robert S. Walker,
Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Georgia.

Before Bell, Coleman and Roney, Circuit Judges.

Judgment

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

On Consideration Whereof, It is now here ordered and adjudged by this Court that except as to Blackwood's conviction on Count 14, which is reversed, the judgment of the District Court is, in all other respects, affirmed.

December 18, 1973

Issued as Mandate

In the United States Court of Appeals
for the Fifth Circuit

No. 73-1398

United States of America,
Plaintiff-Appellee,

versus

Robert B. Bruce Robert A. Blackwood and
Robert S. Walker,
Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Georgia.

On Petition for Rehearing

(January 25, 1974)

Before Bell, Coleman and Roney, Circuit Judges.

Per Curiam:

It Is Ordered that the petition for rehearing filed on behalf of Robert B. Bruce in the above entitled and numbered cause be and the same is hereby Denied.

APPENDIX II

United States District Court
Northern District of Georgia
Atlanta Division

United States of America

vs.

Robert A. Blackwood
Robert B. Bruce
Robert S. Walker

Criminal No. 26,904

Amended Verdict

(Filed February 8, 1973)

The original verdict dated November 21, 1972 and filed on November 22, 1972, is hereby designated null and void and of no legal effect and in lieu thereof this amended verdict is hereby entered and filed.

This case involves another of those combination mail and securities frauds which have plagued the intrastate securities market intermittently since World War II.

The issuer in this instance was the American Capital Corporation which was incorporated in Georgia in 1966. Its organizer and president was the defendant Walker. He caused the company to be formed, planned the first prospectus of January 31, 1967, and the company's sales material. Later he also spent most of the company's money. Before organizing the company he succeeded in obtaining paper title to a valuable but

heavily encumbered piece of Florida land. This property, which was used to generate a very dubious net worth on the company's balance sheet, was also the company's only tangible asset and almost exclusively constituted the "bait" on the strength of which the stock and investment certificates were sold. It was acquired, at a total cost of $380,387.74 and without cash, by having the company reassume or guarantee the indebtedness against the land, issue $70,000 in notes and by giving to the seller's president 35,000 shares of the company's organizational stock, most of which had been issued to the officers gratuitously and in consideration of their "services" in organizing the company. The encumbrances against the land were in default when the land was acquired.

Walker then found or produced a CPA, who had worked with him before, and who was later de-certified, who "window dressed" the company's balance sheet by putting in this land at an appraised value of $1,076,600, based on an earlier but updated MAI appraisal.

The aim and avowed purpose of the company was to lend money to new and smaller companies and to improve on the mutual fund concept by having the company promise to "guarantee" to the investors a 6% return, without any loading charge to the investors, plus a right to proportionately share in 25% of the company's anticipated profits. The 6% return was later raised to a promise of 7%, and this at a time when, by its own admission, the company was already insolvent.

The defendant Blackwood, an attorney, was employed to register the venture with the Securities Commissioner of Georgia and to steer it around and past the Investment Company Act of 1940, 15 U.S.C. §§ 80a-1, *et seq.*

During its two-year history the company sold in excess of $200,000 in stock and investment certificates and spent the proceeds without, so far as the court can ascertain, ever mak-

ing a single cash investment of the kind contemplated by the charter and the prospectus.

Counts Seven and Eleven of the indictment were dismissed by the Government for want of evidence.

Omitting the conspiracy count which will be dealt with later, the court has no hesitation in holding the defendant Walker guilty as charged on each of the remaining substantive counts of the indictment, except Count Fourteen, which involves a collateral but separate charge relating to defendant Blackwood alone. Specifically, the court finds defendant Walker guilty on each of Counts One, Two, Three, Four, Five, Six, Eight, Nine, Ten, Twelve and Thirteen.

As to the other two defendants, Bruce and Blackwood, the court entertains a doubt—shaky, but nevertheless reasonable—as to whether they initially entered upon this scheme to defraud in bad faith; and since good faith is an absolute defense to a mail fraud charge [**United States v. Diamond,** 430 F.2d 688 (5th Cir. 1970); **Beck v. United States,** 305 F.2d 595, **cert. denied** 371 U.S. 890 (1962)], the court is constrained to find those two defendants not guilty with respect to those counts of the indictment dealing with the distribution and mailing of the original prospectus or with respect to subsequent sales made pursuant to it during the year 1967 and prior to the issuance and mailing of the second prospectus in April 1968. Specifically, the court finds the defendants Bruce and Blackwood not guilty on Counts One, Two, Three, Four, Five, Six, Eight, Ten, Twelve and Thirteen of the indictment.

The evidence as to the issuance of the second prospectus and the activities of all the defendants pursuant to it, present an entirely different picture.

By the time of the issuance of that prospectus on April 5, 1968 (Government Exhibit No. 12) all of the defendants knew

and could not have failed to know that the business they were conducting was a fraud. By that time they knew that the encumbrances against the Florida land had been foreclosed, a fact which they tried to explain away in footnote 8 to the financial statement by saying the company had an option to redeem by paying $300,000, a sum which all knew the company did not have. The so-called prospect of redemption was then used to conjure up visions of a net worth of $897,000 after redemption. They knew and are charged with knowledge that in a whole year of operation the company, while collecting over $200,000 from the sale of stock and investment certificates, had not devoted a single dollar of the company's assets to the purposes for which the corporation was purportedly created, but instead had squandered and spent vast sums of the company's assets in salaries, loans to officers on travel expenses, for household furniture, rental of Cadillac automobiles for officers, all without having earned one dime for stockholders or investors. The very balance sheets and statements of condition contained in the second prospectus, which were prepared by Defendant Bruce from information supplied by Defendants Blackwood and Walker, showed on their face that for the year 1967 the company had incurred a net loss of $131,825 and that for the period from January 1, to February 13, 1968 it had incurred a net loss of $693,196.50. The balance sheet as of February 16, likewise appearing in the second prospectus, showed a deficit net worth at that time of $89,005.33 and an earned deficit, after quasi-reorganization, of $112,452.63. The notes to these financial statements if not flagrantly false, are patently misleading and deliberately fraudulent. Note 2, for example, shows the unaudited net worth of a subsidiary (Babee-Tenda Products Corporation) as $289,000, as against a cost to the company of $77,659 which, as the footnote claims, shows an unaudited appreciation in the book value of the company in excess of $211,000. Note 2 to the financial statement, however, discloses on its face that the so-called subsidiary had just come out of bankruptcy, and the evidence

shows that at the time it had no plant, and was not even a going concern. Numerous other frauds and attempts at deception might be cited but these should suffice.

As indicating the cynical knowledge of the parties as to the scope of the fraud being perpetrated the accountant, Defendant Bruce, facetiously enclosed to Blackwood, who was to obtain the second prospectus, an additional footnote as a jest or joke. This little joke between Bruce and Blackwood, and which Bruce facetiously suggested be added, read as follows:

> "The current deficit of the company was due largely in part to mismanagement by the President, the Board of Directors, the Executive Committee, corporate counsel, the Securities and Exchange Commission, the Georgia Securities Commission, the FBI, the Governor Lester Maddox. In addition, all of the boobs that didn't waste their money by investing into this fraudulent enterprise actually did not enhance the prospects for defalcations. Management and other idiots always expect a CPA to juggle figures to present miraculous conditions which do not exist. With this particular insolvent, almost bankrupt bunch of frauds, the CPA is presenting the truth, the whole truth, and nothing but the truth, even if he has to lie to do it."

In his testimony Mr. Bruce then added:

> "And that, Your Honor, I considered a little levity which naturally would not have been included in the financial statements because it is a complete falsehood."

In his argument before the court Mr. Blackwood stated that when he first read Mr. Bruce's effort at levity he considered it "hilariously funny". For the unfortunate lay victims who invested in this fraud, and particularly the numerous widows among them, the jest must have been a cruel one indeed.

The court therefore finds all three of the defendants Guilty under Counts Nine and Fifteen of the indictment.

The court further finds the defendant Blackwood Guilty under Count Fourteen of the indictment which relates to a transaction relating solely to him and charging a violation of 15 U.S.C. § 77e(a), Nunc pro tunc as of the 21st of November, 1972, and the court finds defendants Walker and Bruce Not Guilty under Count Fourteen.

This 8th day of February, 1973.

/s/ NEWELL EDENFIELD
United States District Judge

INDEX

CITATIONS

Cases: Page

Barnes v. *United States*, 412 U.S. 837 11

Blockburger v. *United States*, 284 U.S. 299 11

Bronston v. *United States*, 409 U.S. 352 9

Gavieres v. *United States*, 220 U.S. 338 11

Gore v. *United States*, 357 U.S. 386 11

Gusow v. *United States*, 347 F. 2d 755, certiorari denied, 382 U.S. 906 7

Lustiger v. *United States*, 386 F. 2d 132, certiorari denied, 390 U.S. 951 7

Silverman v. *United States*, 213 F. 2d 405, certiorari denied, 348 U.S. 828 7

Taylor v. *McKeithen*, 407 U.S. 191 12

United States v. *Lichota*, 351 F. 2d 81, certiorari denied, 382 U.S. 1027 7

United States v. *Maze*, No. 72-1168, decided January 8, 1974 11

Statutes:

15 U.S.C. 77e(a) 2

15 U.S.C. 77q(a) 1,2,7,9,11

18 U.S.C. 371 1

18 U.S.C. 1341 1,7,10,11

18 U.S.C. 1621 9

Miscellaneous:

Mathews, *Criminal Prosecutions Under the Federal Securities Laws and Related Statutes: The Nature and Development of SEC Criminal Cases*, 39 Geo. Wash. L. Rev. 901 (1971) 11

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1291

ROBERT B. BRUCE, PETITIONER

v.

UNITED STATES OF AMERICA

No. 73-1558

ROBERT S. WALKER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury-waived trial in the United States District Court for the Northern District of Georgia, petitioners were convicted of mail fraud in connection with sales of certain securities, in violation of 15 U.S.C. 77q(a) and 18 U.S.C. 1341, and of conspiracy to commit such fraud, in violation of 18 U.S.C. 371. Petitioner Walker was also convicted of fraud in the offer and sale of securities, in violation of 15 U.S.C.

77q(a). Petitioner Bruce was sentenced to concurrent terms of two years' imprisonment, six months to be served in jail with the balance suspended. Petitioner Walker was sentenced to concurrent terms of three years' imprisonment. The court of appeals affirmed (Pet. App. A1-A17)[1] and denied rehearing (Pet. App. A18).[2]

Petitioners' indictment and convictions were based upon the operations of American Capital Corporation, incorporated by petitioner Walker on December 13, 1966, which engaged in two offerings of securities, the first commencing in January 1967, and the second in April 1968. Petitioner Walker was president of the corporation; co-defendant Blackwood provided various legal services to the company; petitioner Bruce, a certified public accountant, was retained to provide the financial statements that were included in two prospectuses relating to the corporation's securities offerings.[3]

The corporation offered two types of securities: common stock and interest-bearing investment certificates. The ostensible purpose of the corporation was to provide loans to smaller, growing companies, and to improve upon the

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[1]"Pet. App." refers to the appendix to Bruce's petition (No. 73-1291).

[2]Co-defendant Robert A. Blackwood was also convicted on similar charges. His conviction was affirmed, except that one count charging sale of unregistered securities, in violation of 15 U.S.C. 77e(a), was reversed (Pet. App. A16).

[3]The Georgia Securities Commission had in the early part of 1968 forbidden American to engage in further sales until a second prospectus was filed. American ceased doing business in May 1969.

mutual fund concept by promising a six percent return on the investment certificates. In fact, the trial court found that, although the corporation acquired some $200,000 from the sale of its securities, it did not endeavor to engage in the type of investment promised in the prospectuses and that it contemporaneously wasted large sums on the personal comforts of the officers, particularly petitioner Walker and Blackwood (Pet. App. A20-A21).[4]

Petitioner Walker, who, as president of the corporation, directed its operations, was adjudged guilty on fraud counts arising from both the first and second offerings, the trial court holding that he had acted in bad faith from the incipiency of the coporation's existence. The court entertained a reasonable doubt as to whether petitioner Bruce and co-defendant Blackwood had initially participated in the corporation's operation in bad faith, and accordingly found them not guilty of the charges arising from the first prospectus and offering. As to the second prospectus and offering, the court found them both guilty because, along with petitioner Walker, they "knew and could not have failed to know that the business they were conducting was a fraud" (Pet. App. A21-A22).

In addition to its general finding that American, under petitioner Walker's direction, had not sought to engage in the investment plan envisioned by the prospectuses, the trial court also determined that the two prospectuses contained a variety of financial compilations and statements which "if not flagrantly false, are patently mislead-

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[4]An SEC accountant testified that, from his examination of its records, the corporation had never received any identifiable income from any source (Tr. V 58-59).

ing and deliberately fraudulent" (Pet. App. A22). These misleading representations in the two prospectuses consisted of the following:[5]

(a) When American was first incorporated, it acquired certain Florida land (Ridge Manor) by issuing 35,000 shares of common stock and incurring obligations amounting to $380,000, which land both the first and second prospectuses listed as having a value of $1,076,600. In fact, the claimed value of Ridge Manor was an estimated value of the property after subdivision and development, which had not yet begun and which American had not the funds to initiate. Similarly, the first prospectus failed to mention that the mortgage on the Ridge Manor land that American had purchased was overdue at the time of purchase. The second prospectus admitted in a footnote that the land had subsequently been foreclosed, but it stated that American had an option to redeem the property by June 10, 1968, upon payment of approximately $300,000 of the mortgages. This transaction, the statement indicated, would provide an equity of $775,000 and a net worth of $897,000; in fact, the company had no hopes of raising the $300,000 necessary for redemption.

(b) The first prospectus stated that the sales costs of the offered securities would not exceed 4 percent for the certificates and 15 percent for the stock. In fact, salesmen received 20 percent and 33 1/3 percent, respectively.

(c) The first prospectus listed under assets a note receivable for $20,000, which a later footnote states

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[5]We are lodging with the Clerk the court of appeals appendix, which contains copies of both the first and second prospectuses (pp. 85, *et. seq.*).

was due from an officer (Blackwood) on December 8, 1967, and bore interest of 6 percent per annum. The footnote further stated that the only security for the note was 40,000 shares of American. In fact, the note contained on the back a stipulation that it could only be satisfied from the 40,000 shares and did not represent a general indebtedness on the part of Blackwood.

(d) In the second prospectus, under assets, cash at hand was listed as $42,809.35. Hidden in a general footnote several pages later, however, was the statement that a $40,000 bank loan was secured by collateral of unspecified value, consisting of a restricted savings account at the lender bank, and that that savings account had been used to pay off the loan after the date of the accountant's financial statement appearing in the prospectus. Another $2,000 had recently been committed, by a check still outstanding, as a down payment for an airplane. Thus, the actual cash assets should have been listed as $809.35. In addition, the liability incurred for the airplane purchase was not listed under liabilities.

(e) Also listed under assets in the second prospectus was an entry for "Investment in wholly-owned subsidiary, at cost," which was given a value of $77,659.28. A later footnote explained that American had acquired the assets of Babee-Tenda Safety Products, a company that had been adjudicated bankrupt, in return for 26,388 shares of American ($0.10 par value) and the assumption of $75,020 of notes payable by Babee-Tenda. The footnote further explained that American planned to build a new plant for the newly acquired subsidiary, that the "unaudited" sales of Babee-Tenda had been $2,000,000 per year, and that the "unaudited" net worth of Babee-Tenda was some $289,000, thus resulting in an appreciation in book value to American of $211,000. The district court found, however, that this $77,000 "asset" was in fact of questionable actual worth

because American at the time had no reasonable hope of securing enough capital to revitalize the subsidiary (Pet. App. A22-A23).

(f) The second prospectus indicated that the total amount paid in salaries to company officers did not exceed $16,000. But, while listing a variety of expenses under "Comparative Statement of Income and Expenses,"[6] the prospectus failed to disclose that, of those expenses, petitioner Walker had received some $47,000 worth of benefits in the form of payments of personal automobile loans, other personal loans, apartment rental, etc. In total, petitioners and Blackwood received approximately $60,000, or 20 percent of the capital received by the corporation.

(g) Although the company was in dire financial condition by the time of the second prospectus, that document sought to induce false confidence in the company by placing a notice on the first page stating that the interest yield on investment certificates had been raised from six to seven percent.

That petitioners did not participate in American's operation and sales in good faith was highlighted in a facetiously suggested footnote that petitioner Bruce, the C.P.A., forwarded to Blackwood (Pet. App. A23):

> The current deficit of the company was due largely in part to mismanagement by the President, the Board of Directors, the Executive Committee, corporate counsel, the Securities and Exchange Commission, the Georgia Securities Commission, the F.B.I., the Governor Lester Maddox. In addition, all of the boobs that didn't waste their money by investing into this fraudulent enterprise actually did not enhance the prospects for defalcations. Management and other

[6]This included approximately $131,000 for 1967.

> idiots always expect a C.P.A. to juggle figures to present miraculous conditions which do not exist. With this particular insolvent, almost bankrupt bunch of frauds, the C.P.A. is presenting the truth, the whole truth, and nothing but the truth, even if he has to lie to do it.

1. Both petitioners argue that the court of appeals applied an incorrect legal standard in determining whether the evidence supported the district court's findings of fraud. Petitioners also contend that the courts of appeals improperly held that one who offers the securities of a financially-troubled business will be deemed criminally liable for fraud should the enterprise fail.

Contrary to petitioners' suggestion, the court of appeals did not establish an overly broad or novel definition of fraud, predicated only upon a standard of "moral uprightness." Rather, after referring to the language quoted by petitioners, the court adhered to the traditional principle that, in a fraud prosecution under Sections 1341 or 77q(a), the government must demonstrate "a scheme reasonably calculated to deceive persons of ordinary prudence and comprehension" (Pet. App. A12). This is a test of long-standing application. See *Silverman* v. *United States*, 213 F. 2d 405, 407 (C.A. 5), certiorari denied, 348 U.S. 828; *Gusow* v. *United States*, 347 F. 2d 755, 756 (C.A. 10), certiorari denied, 382 U.S. 906; *United States* v. *Lichota*, 351 F. 2d 81, 89 (C.A. 6), certiorari denied, 382 U.S. 1027; *Lustiger* v. *United States*, 386 F. 2d 132, 138 (C.A. 9), certiorari denied, 390 U.S. 951.[7]

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[7]In full, the court discussed the issue of fraud as follows (Pet. App. A12):

> Essentially, a scheme to defraud is measured by a nontechnical standard. "It is a reflection of moral uprightness, of fundamental honesty, fair play and right dealing in the

In petitioners' case, although the prospectuses did indicate that the corporation had a deficit net worth, the various financial statements in the prospectuses were unquestionably designed to deceive the ordinarily prudent individual into believing that the corporation possessed a potential for profit, when in fact petitioners and Blackwood recognized that the business would not succeed. As the district court found, the representations were, "if not flagrantly false,* * * [then] patently misleading and deliberately fraudulent" (Pet. App. A22).

For example, while the second prospectus mentioned that Babee-Tenda was acquired out of bankruptcy, it was listed as having a net worth of $289,000 and sales of $2,000,000 per year, when in fact the corporation was no longer an on-going operation, and American had no reasonable financial prospects for its revitalization. Nor did the prospectus mention, in a listing of corporate expenses, that twenty percent of the capital previously acquired had been channeled into personal benefits for the company officers. The value of the Ridge Manor property was inflated to reflect its value when subdivided; similarly, while foreclosure on the Ridge Manor property was revealed, the prospectus, by suggesting an option to redeem when no funds to do so were available, incorrectly represented that the corporation would be solvent once the too highly-valued

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general and business life of members of society", *Gregory* v. *United States*, 5 Cir., 1958, 253 F. 2d 104, 109.

The scheme need not be fraudulent upon its face or misrepresent any material fact. All that is necessary is that it be a scheme reasonably calculated to *deceive* persons of ordinary prudence and comprehension. The intent of the crime is shown by the scheme itself—here, the active promotion of a company known to be inescapably insolvent by making impossible representations of possible wealth to potential investors * * *.

property was reacquired. Finally, to list cash assets at in excess of some $43,000 and to obliquely indicate in a footnote that $40,000 of that amount represented proceeds of a loan which had already been repaid, can only be deemed an attempt to mislead.

Petitioners thus err in characterizing the holding below as imposing potential criminal liability on anyone who offers securities in a financially-troubled enterprise. The court of appeals found criminal responsibility based on a finding that petitioners and Blackwood " 'knew and could not have failed to know that the business they were conducting was a fraud' " (Pet. App. A11) in which none of the company's funds obtained through securities sales had been invested for the purposes stated.[8]

2. Petitioner Walker also argues that he was improperly subjected to double punishment by his conviction on counts Two and Twelve of the indictment, which involved the transaction in which both a letter and a stock certificate for three hundred shares of American were mailed to a purchaser on November 3, 1967. Count Two charged a violation of 15 U.S.C. 77q(a), while Count Twelve

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[8]Petitioner Walker's reliance (Pet. 9-10) upon *Bronston* v. *United States*, 409 U.S. 352, is misplaced. That case involved the question whether a literally true but unresponsive and misleading answer to a question posed during cross-examination of a witness constituted perjury, in violation of 18 U.S.C. 1621. As this Court noted, the witness's answer in *Bronston* was "not to be measured by the same standards applicable to criminally fraudulent * * * statements. In that context the law goes 'rather far in punishing intentional creation of false impressions by a selection of literally true representations, because the actor himself generally selects and arranges the representations.' " 409 U.S. at 358, n. 4.

alleged a violation of 18 U.S.C. 1341.[9] We note ini-

[9]The exact wording of the two counts, not accurately reproduced in Walker's petition (pp. 12-13), are as follows:

> *Count Two:* 1. The grand Jury realleges all of the allegations contained in paragraphs 1 to 18, inclusive, of Count One of this indictment.
>
> 2. On or about November 3, 1967, the defendants and West did willfully and unlawfully, in the offer and sale of a security, namely, the common stock of American Capital Corporation, by use of the mails, employ the aforesaid scheme and artifice to defraud, obtain money and property by means of untrue statements of material facts and omissions to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, and engage in transactions, practices and a course of business which operated as a fraud and deceit upon the purchasers of said securities, including Thomas D. Wyatt, said use of the mails being as follows: On or about November 3, 1967, in the Northern District of Georgia, the defendants and West willfully caused a letter dated November 3, 1967, enclosing a stock certificate of American Capital Corporation, to be delivered by the Post Office Department to Thomas D. Wyatt, 512 Fairground Street, Apt.B, Marietta, Georgia 30060; in violation of Section 77q(a), Title 15, U.S. Code.
>
> *Count Twelve:* 1. The Grand Jury realleges all of the allegations contained in paragraphs 1 to 18, inclusive, of Count One of this indictment as constituting and describing a scheme and artifice which the defendants and West devised and intended to devise to defraud and to obtain money and property by means of false and fraudulent pretenses, representations and promises.
>
> 2. On or about November 3, 1967, in the Northern District of Georgia, the defendants for the purpose of executing the aforesaid scheme and artifice to defraud and attempting to do so, unlawfully, willfully and knowingly caused to be delivered by U.S. Mail according to the direction thereon an envelope and contents addressed to Mr. Thomas D. Wyatt, 512 Fairground Street, Apartment B, Marietta, Georgia, 30060, said contents consisting of a letter on American Capital Corporation *stationery dated November 3, 1967 and signed Robert F. Walker, President, and a stock certificate for 300 shares of stock in American Capital Corporation;* in violation of Section 1341, Title 18 U.S. Code. [Emphasis supplied.]

The emphasized portion was omitted through an apparent printing error.

tially that there is no need for the Court to address this issue, as petitioner received concurrent sentences on Counts Two and Twelve, as well as on the other ten counts for which he was convicted. See *Barnes* v. *United States*, 412 U.S. 837, 848, n. 16.

In any event, petitioner Walker's contention (Pet. 14-15) that the court of appeals "has announced a new double jeopardy test" at variance with *Gavieres* v. *United States*, 220 U.S. 338, upon which petitioner relies, is unfounded. The court of appeals (Pet. App. A13) explicitly relied upon the standard set forth in *Gavieres*—that each statute allegedly violated requires proof of a fact that the others do not. See also *Blockburger* v. *United States*, 284 U.S. 299, 304. The question whether the court of appeals properly applied that test to the particular facts of this case is not one of general importance warranting review by this Court.[10]

3. Petitioner Bruce argues that the failure of the court of appeals specifically to address in its opinion certain issues raised on appeal denied him due process. The third

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[10]Section 77q(a) requires proof of an "offer or sale of * * * securities," which Section 1341 does not, while the latter requires that the use of the mails be "for the purpose of executing" a scheme to defraud (cf. *United States* v. *Maze*, No. 72-1168, decided January 8, 1974, slip op. 10), which the former does not. See generally Mathews, *Criminal Prosecutions Under the Federal Securities Laws and Related Statutes: The Nature and Development of SEC Criminal Cases*, 39 Geo. Wash. L. Rev. 901, 921-923 (1971). These distinctions reflect the fact that Sections 77q(a) and 1341 constitute different "regulatory controls devised by Congress as means for dealing with a social evil * * * " (*Gore* v. *United States*, 357 U.S. 386, 389), fraudulent securities transactions in Section 77q(a), and misuse of the mails in Section 1341.

of these proffered issues—whether the district court erred in denying a motion for judgment of acquittal—simply disputes whether the evidence was sufficient to support petitioner Bruce's conviction. This evidence, fully discussed in the opinion of the court of appeals and summarized above, sufficiently supports the district court's guilty verdict. In any event, as to that and the other two issues mentioned,[11] there is no reason to assume that the court of appeals did not consider them, and the failure to address them expressly in its opinion did not deny petitioner due process. See *Taylor* v. *McKeithen*, 407 U.S. 191, 194, n. 4.

It is therefore respectfully submitted that the petitions for writs of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

AUGUST 1974.

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[11]First, petitioner Bruce contends that a government witness who testified as to generally accepted accounting procedures was not qualified. To the contrary, the witness, George Callahan, had engaged in private practice for two years, had worked with the Internal Revenue Service for nine years, was currently Chief Regional Accountant for the Securities and Exchange Commission, was a certified public accountant, and currently spent approximately 60 percent of his working time on accounting matters (Tr. V 33-34). Secondly, it is contended it was improper for the prosecutor to elicit from petitioner Bruce during cross-examination that he had been decertified in an unrelated case. However, on direct examination petitioner Bruce had testified as to his professional licensing, and represented himself as being a C.P.A. cognizant of currently accepted accounting techniques The questioning of him as to this matter was thus within the proper scope of the government's cross-examination (Tr. VI 143-149).